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No. 88-1034

IN THE SUPREME COURT OF THE UNITED STATES
Oct. Term, 1988

QUENTIN M. DERRYBERRY, PETITIONER

V.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE 6TH CIRCUIT

RESPONSE OF PETITIONER TO BRIEF IN OPPOSITION

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In the Supreme Court of the United States
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No. 88-1034

Quentin M. Derryberry II, Petitioner

v.

United States of America

On Petition For a Writ of Certiorari
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For the 6th Circuit

Response of Petitioner To Brief In Opposition

ARGUMENT IN REPLY

I

Petitioner's Alleged Perjurious Response Was Given To A Question Susceptible To More Than One Interpretation.

The government's response brief is a disingenuous presentation of evidence that

was not accepted by either the jury or the trial court and of conclusions of fact and law unsupported by the record below and by case law. Appellant will briefly address certain of the mischaracterizations by the government of the evidence below and of appellant's arguments.

Appellant acknowledged in both the bankruptcy removal proceeding in 1985 and in the trial court below that he had received $8,500 in checks from Mr. Weber which the government alleged in the indictment had been embezzled by appellant from the Hartley bankruptcy estate. This $8,500, according to the government, was part of the $13,880 which appellant stated he did not have any part of. This dichotomy forms the essence of this Petition for Certiorari.

Realizing the weakness of its position on the issue presented, however, the government attempts to paint appellant in the worst light possible by focusing on the other money, apart from the $8,500, which

purportedly comprised the $13,880. At p. 3 of its Brief the government states that, with respect to the checks that comprised the balance of the $13,880, appellant repeatedly assured the McComb Bank president that he had authorized Mr. Weber to endorse his (petitioner's) name to those checks. Obviously, petitioner presented evidence to the contrary. More obviously, both the jury and the trial court believed petitioner since the jury acquitted him of all charges of conspiracy with Mr. Weber and the trial court entered a judgment of acquittal on the other perjury count which charged that petitioner perjured himself in the bankruptcy proceeding when he denied in that proceeding that he had any knowledge of Mr. Weber's forged endorsements prior to November of 1983.

Turning to the real issue before this Court, the government attempts to persuade this Court of its position by, among other things, mischaracterizing petitioner's

argument. The government states at pp. 6 and 7 of its Brief that "(t)he issue in this case is . . . not the truth or falsity of petitioner's testimony, but whether petitioner understood the question to refer to only a portion of the $13,880, as he claims". (emphasis added) Petitioner has nowhere made the argument that he understood the question asked by Mr. Clark in the bankruptcy proceeding to refer only to a portion of the $13,880. Rather, as indicated in the Petition For A Writ of Certiorari, at pp. 28 and 29, petitioner understood "the $13,880" to refer to the money purportedly held by Mr. Weber in a separate account at the time of the hearing on the Application for Instructions and Advice filed with the Bankruptcy Court by petitioner's counsel.

We cannot overstate the fact that, if you accept the government's interpretation of the question, it would be patently ridiculous for the petitioner to deny ever having had any of "the $13,880" in the very

same proceeding in which he had admitted having taken possession of the $3,500 McComb Bank check and used it for his own purposes. Obviously neither petitioner nor the Bankruptcy Court understood Mr. Clark's question in the context that the government has sought to place it.[1] The Bankruptcy Court, having heard petitioner testify to this receipt of the $3,500 McComb Bank check and other funds from Mr. Weber, part of which consisted of the $5,000 Midwest check, specifically found that "the $13,880 was never turned over the trustee by Mr. Weber . . . and that there was no evidence that the money was ever presented to the trustee." (Appendix, Exhibit C, pp. 8, 27 and 28).

With respect to petitioner's legal authority, the government argues that

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1. The government produced no evidence at trial that Mr. Clark, the questioner, understood or intended the question in accordance with the government's interpretation.

Bronston v. United States, 409 U.S. 352 (1973) is inapplicable to the case at bar because in that case the answer given was misleading but literally true, whereas in the case at the bar, the government contends, the answer was literally false. Obviously if the interpretation placed on the question by the petitioner and the Bankruptcy Court is accepted, then petitioner's answer is literally true. But the government argues that a defendant's understanding of the question is an issue for the jury to decide, citing United States v. Bell, 623 F.2d 1132, 1136 (5th Cir. 1980) and other cases. As in the case of United States v. Reveron Martinez, 836 F.2d 684 (1st Cir. 1988), however, the government "mishears for whom the Bell tolls" Id. at 691 fn. 10.

Petitioner recognizes that Bell distinguishes Bronston.

> In Bronston, the answer was a full explanatory sentence, the truthfulness of which could be determined without reference to the question. Here, the answer simply was "no"; the truthful-

> ness of that answer can be determined only by first looking to the question. Bronston simply did not deal with a yes or no answer given to a question susceptible to more than one interpretation.

Bell, Id. at 1136. Bell further observed that in the situation where the defendant's answer could be true under one interpretation of an arguably ambiguous question the "prevailing view" is that in such instances it is for the jury to decide the defendant's understanding of the question. Bell notes, however, that there is contrary authority, including Sixth Circuit authority, see United States v. Tonelli, 577 F.2d 200 (3rd Cir. 1978) and United States v. Wall, 371 F.2d 398, 399-400 (6th Cir. 1967), (which was cited with approval in Bronston, Id. at 600) to the effect that a defendant may never be convicted of perjury where the question could have been interpreted more than one way. See also, United States v. Eddy, 737 F.2d 564 (6th Cir. 1984) ("Vague and ambiguous questions are not acceptable").

Bell further notes that even in the situation where a question is subject to different interpretations, the jury's resolution of the issue is not immune from appellate review. If after reviewing the evidence in the light most favorable to the government, the appellate court finds that a reasonably minded jury must have a reasonable doubt as to the essential elements of the perjury charge, then defendant's conviction cannot stand. supra at 1136.

In the case at bar the Sixth Circuit did not undertake this exercise. Ignoring its own precedents and petitioner's arguments, the Sixth Circuit found simply that petitioner's testimony was literally false because petitioner had testified that he was "familiar with the figure that is $13,880". The Sixth Circuit did not, however, further examine the context which bred petitioner's familiarity. The fact is that when being asked about "the $13,880", petitioner was reviewing the Bankruptcy

Court's Order of June 4, 1982, which was entered in response to and made reference to the Trustee's Application For Instructions and Advice which had come on for hearing before the Bankruptcy Court on May 27, 1982. That document specifically references the fact that the approximately $13,000 contributed by the creditors, later listed on the Court's June 4 Order, was then in escrow with Mr. Weber. That document was drafted by petitioner's counsel based on information he received from Mr. Weber approximately three to four months after petitioner had received the monies from Mr. Weber which the government contends were part of "the $13,880".

A fair reading of the transcript of petitioner's testimony demonstrates that, as in Bell, after placing his answer in the context in which it was given, a jury could not find him guilty beyond a reasonable doubt. As Bell observes, "if after conviction the defendant offers a contrived

hypertechnical or lame interpretation of his answer . . . the jury's decision must be left undisturbed." Bell, supra at 1136. Here, as referenced in Bell, the petitioner has not created a lame interpretation of his testimony post conviction. The petitioner has consistently set forth his interpretation of the question posed, and that interpretation happens to coincide with the interpretation obviously placed on the question by the Bankruptcy Court who heard petitioner's allegedly perjurious testimony.

The evidence below certainly does not establish that petitioner understood the question posed by counsel for McComb Bank in the same manner that the government has sought to interpret that question. As stated in Bell, supra at 1137, echoing United States v. Tonelli, 577 F.2d 194, 200 (3rd Cir. 1978), "Defendants may not be assumed into the penitentiary." To allow defendant's conviction for perjury to stand in this case, this Court must assume the

government's interpretation of Mr. Clark's question is what petitioner understood. Such an assumption is unwarranted. To adopt the government's rationale this Court must ignore the context of the question, petitioner's avowed contrary understanding of the question and the Bankruptcy Court's obvious understanding of the question. This Court must conclude that a reasonable-minded jury must have a reasonable doubt in this case as to the existence of the elements of perjury.

II

The Bankruptcy Court's Judgment Is Res Judicata And Collateral Estoppel Of The Petitioner's Perjury Conviction.

The government contends that petitioner waived the argument that his conviction on Count 3 is barred under principles of res judicata and collateral estoppel because petitioner did not raise the argument in the trial court or in the Court of Appeals until petitioner filed his

petition for rehearing, citing United States v. Lovasco, 431 U.S. 783 (1977) and Lawn v. United States, 355 U.S. 339 (1958). In Lovasco, the petitioner did not raise the question sought to be reviewed even in a petition for rehearing and in Lawn, the petitioner did not raise the question sought to be reviewed even in his petition for writ of certiorari. Both cases, however, recognize that in exceptional circumstances, this Court will review questions not directly raised below.

In the case at bar, petitioner did not squarely raise the res judicata and collateral estoppel effect of the Bankruptcy Court judgment in the trial court as to this count. That was largely because petitioner has been overly consumed with the argument concerning the ambiguity of the question which is the subject of Count III. In deed, petitioner stands today convicted of perjury for a response he made to a question which to date he cannot comprehend as being perjurious. He

has spent three frustrating years asking courts to view the context in which the question was asked and the answer was given. Throughout that same time he contended that the Bankruptcy Court's Order was res judicata and collateral estoppel of the embezzlement charges brought against him. The res judicata and collateral estoppel effects of the Bankruptcy Court judgment were considered by both the trial court and the Court of Appeals. The Court of Appeals found that the principles of res judicata and collateral estoppel did bar the government's charges of embezzlement. Petitioner ultimately argued to the Court of Appeals, admittedly on petition for rehearing, that the same Bankruptcy Court's Order had the same collateral estoppel and res judicata effects on the perjury charge in Count III. The Court of Appeals denied petitioner's petition for rehearing in a one line Order.

Under these circumstances, it ill

becomes the government to contend that petitioner has waived this argument. The government has had every opportunity to argue the application of the collateral estoppel and res judicata effects of the Bankruptcy Court's judgment. The trial court found in favor of the government, denying petitioner's motion to dismiss the indictment. The Sixth Circuit, however, found that that judgment did have res judicata and collateral estoppel effects with respect to the government because the government was the largest creditor of the Hartley bankruptcy estate, was given notice of the proceedings, and was given the opportunity to participate. Clearly the application of res judicata and collateral estoppel principles have not been waived.

The only remaining question is whether the Bankruptcy Court made a specific finding that precludes the perjury charge against petitioner. The Bankruptcy Court's findings that the $13,880 was never turned over to the Trustee by Mr. Weber and that

there was no evidence that the money was ever presented to Mr. Derryberry preclude the perjury conviction because they constitute a finding that Mr. Derryberry's answer was literally true.

Consequently the only question the government could have posed with respect to the res judicata and collateral estoppel effects of the Bankruptcy Court's judgment on Count III was determined in favor of petitioner on Count II. The government makes it's waiver argument on Count III because it cannot argue substitively against the res judicata and collateral estoppel effects of the Bankruptcy Court's judgment on petitioner's conviction for perjury.(2)

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(2) The government makes a feeble attempt to undo the Sixth Circuit's finding with respect to Count II by stating in conclusory fashion, without any record authority, that the government was not a party to the bankruptcy proceeding and did not have a full and fair opportunity to be heard. The argument is flatly contradicted by the record. The government was the largest creditor of the Hartley bankruptcy estate; it filed an appearance in that

The fact of the Bankruptcy Court's findings and in the face of the Sixth Circuit's determination of the res judicata and collateral estoppel effects of the Bankruptcy Court judgment, it would be wholly incongruous and unjust for this Court to let stand petitioner's conviction for perjury.

The government also argues that a judgment based on perjured testimony should not be given res judicata or collateral estoppel effects, citing United States v. Fayer, 573 F.2d 741, cert. denied 439 U.S. 831 (1978). The government should read the cases it cites rather than just merely skimming the head notes. Fayer, in fact, stands for the proposition that a specific finding made in a prior proceeding even if

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cont.
estate; was given notice of the proceeding; and, as the largest creditor, undoubtedly had more interest than anyone in the outcome. Certainly the government was given the opportunity to participate. It chose not to.

purportedly the product of perjured testimony, would have res judicata effects on a specific prosecution for perjury. Clearly Fed. R. Civ. P. 60 with respect to the finality of judgment, even those procured by fraud, also serves to defeat the government's argument.

CONCLUSION

For the reasons hereinbefore set forth, petitioner prays that this Honorable Court grants the Petition for Writ of Certiorari and reverses petitioner's conviction for perjury under Count II of the government's indictment.

Respectfully submitted,

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